Dr Michael Jeyakumar Devaraj v Ketua Pengarah Unit Penyelarasan Pelaksanaan di Jabatan Perdana Menteri & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–474 OF 2010
AZIAH ALI J
25 FEBRUARY 2011

Civil Procedure — Judicial review — Application for leave — Special constituency allocation — Evaluation of qualifications or applications of — Exercise of discretion — Whether matter of management prerogative — Whether reviewable by court — Whether ought to be resolved at hearing of substantive motion

The applicant, a Member of Parliament for the Sungai Siput constituency (P62), had, between years 2008–2010, made applications for funds from the special constituency allocation for various projects in the constituency and this includes SMJK Shin Chung, SJK Methodist and Nurul Ihsan Orphanage and to aid the *orang asli*. The applicant contended that the second respondent had, vide a letter dated 12 October 2010 ('written decision'), showed that the funds from the special constituency allocation had been given to SMK Shin Chung, SMK Methodist and Nurul Ihsan Orphanage through some other parties' application while his application was rejected. The applicant contended that the respondents, in the exercise of discretion with regard to the administration and disbursement of the special constituency allocation had acted capriciously, with bias and/or for improper purpose, had failed to take into account relevant factors and had taken into account irrelevant factors. Hence, the applicant applied for leave for judicial review seeking, inter alia, a declaration that the decision of the second respondent set out in the second respondent's letter dated 12 October 2010 or any part thereof was a breach of art 8(1) of the Federal Constitution and as a result, unconstitutional and void. Further, an order of this court for the disclosure and the determination of the manner upon which the power and/or discretion vested in the respondents (or any of them) were exercised. The attorney general objected to the application for leave on the ground that there was no substance in the application and that the application was an abuse of process. It was contended that this court was not the proper forum to evaluate the qualifications or applications of the special constituency allocation and to determine the policy which, being a management prerogative is not reviewable by the court.

Held, allowing the leave application:

(1) The exercise of discretion in the evaluation of the qualifications or applications of the special constituency allocation may well be based on

policy considerations within the management prerogative but the applicant contended that the respondents, in the exercise of discretion with regard to the administration and disbursement of the special constituency allocation, had acted capriciously, with bias and/or for improper purpose, had failed to take into account relevant factors and had taken into account irrelevant factors (see para 14).

(2) The mere assertion that this was a matter of management prerogative and therefore not reviewable by the court was insufficient. It is a question of evidence. There are limits to the court's inquiry through judicial review of certain executive actions. It was not for the courts to determine whether a particular policy or particular decision taken in fulfillment of a policy is fair. The court is only concerned with the manner the decision had been taken (see paras 15–16).

(3) The applicant had shown that there was a case fit for further consideration. There are issues that go to the merits of the application which ought to be resolved at the hearing of the substantive motion (see para 17).

[Bahasa Malaysia summary

Pemohon, seorang ahli Parlimen bagi Bahagian Sungai Siput (P62), telah, di antara tahun-tahun 2008–2010, membuat permohonan untuk dana daripada peruntukan khas kawasan bagi pelbagai projek di bahagian tersebut dan ini termasuk SMJK Shin Chung, SJK Methodist dan Rumah Anak Yatim Nurul Ihsan dan untuk bantuan orang asli. Pemohon menghujah bahawa responden kedua telah, melalui surat bertarikh 12 Oktober 2010 ('keputusan bertulis'), menunjukkan bahawa dana-dana untuk peruntukan khas kawasan telah diberikan kepada SMJK Shin Chung, SJK Methodist dan Rumah Anak Yatim Nurul Ihsan melalui permohonan pihak-pihak lain sementara permohonannya ditolak. Pemohon menghujah bahawa responden-responden, dalam pelaksanaan budi bicaranya berkaitan dengan pentadbiran dan pemberian peruntukan khas kawasan telah bertindak secara tidak menentu, tidak adil dan/atau bagi tujuan yang tidak wajar, telah gagal mengambil kira faktor-faktor yang relevan dan telah mempertimbangkan faktor-faktor yang tidak relevan. Maka, pemohon memohon untuk kebenaran untuk semakan kehakiman memohon, antara lain, satu deklarasi bahawa keputusan responden kedua yang dinyatakan di dalam surat responden kedua bertarikh 12 Oktober 2010 atau sebahagiannya adalah pelanggaran perkara 8(1) Perlembagaan Persekutuan dan akibatnya, tidak berperlembagaan dan batal. Selanjutnya, perintah mahkamah ini untuk penzahiran dan pemutusan cara di mana kuasa dan/atau budi bicara terletak hak kepada responden-responden (atau mana-mana daripada mereka) dilaksanakan. Peguam negara membantah permohonan kebenaran atas alasan bahawa tidak ada alasan kukuh dalam permohonan dan bahawa permohonan tersebut adalah penyalahgunaan proses. Dihujahkan bahawa mahkamah ini bukan forum yang sesuai untuk

menilai kelayakan atau permohonan untuk peruntukan khas kawasan dan untuk menentukan polisi di mana, sebagai prerogatif pengurusan ia tidak boleh disemak oleh mahkamah.

Diputuskan, membenarkan permohonan untuk kebenaran:

(1) Pelaksanaan budi bicara untuk penilaian kelayakan atau permohonan untuk peruntukan khas kawasan boleh didasarkan atas pertimbangan polisi dalam prerogatif pengurusan tetapi pemohon menghujah bahawa responden-responden, dalam melaksanakan budi bicara berkaitan dengan pengurusan dan pemberian peruntukan khas kawasan telah bertindak secara tidak menentu dengan tidak adil dan/atau untuk tujuan yang tidak wajar, telah gagal mengambil kira faktor-faktor yang relevan dan telah mempertimbangkan faktor-faktor yang tidak relevan (lihat perenggan 14).

(2) Pernyataan semata-mata bahawa ini adalah perkara yang melibatkan prerogatif pengurusan dan oleh itu tidak boleh disemak oleh mahkamah tidak mencukupi. Ia adalah persoalan keterangan. Terdapat had-had untuk siasatan mahkamah melalui semakan kehakiman untuk tindakan eksekutif tertentu. Ia bukan untuk mahkamah menentukan sama ada sesuatu polisi atau keputusan dibuat untuk memenuhi polisi adalah adil. Mahkamah hanya mengambil kira cara keputusan tersebut dicapai (lihat perenggan 15–16).

(3) Pemohon telah menunjukkan bahawa terdapat kes yang sesuai untuk pertimbangan lanjut. Terdapat isu-isu yang membabitkan merit permohonan yang perlu diputuskan dalam perbicaraan usul substantif (lihat perenggan 17).]

Notes

For cases of judicial review in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4797–4807.

Cases referred to

Attorney-General v De Keyser's Royal Hotel, Limited [1920] AC 508, HL (refd)

Chin Mee Keong & Ors v Pesuruhjaya Sukan [2007] 6 MLJ 193; [2007] 5 CLJ 36, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

A *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
B Federal Constitution art 8(1)
Rules of the High Court 1980 O 53, O 53 r 1(1), (2)
Specific Relief Act 1950 s 44, Part II, Chapter VIII

Ambiga Sreenevasan (Mahaletchumi Balakrishnan and Daniel Albert with her) (Sreenevasan) for the applicant.
C *Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the attorney general.*

Aziah Ali J:

D

[1] The applicant is a member of Parliament ('MP') for the Sungai Siput constituency in the State of Perak. The first respondent is the Director General of the Implementation Coordination Unit ('ICU') of the Prime Minister's Department. The second respondent is the Director of the Perak State
E Development Office (*Pejabat Pembangunan Negeri Perak*) ('PPN'). The applicant applies for leave for judicial review under O 53 of the Rules of the High Court 1980. The attorney general objected to the application. I dismissed the objection and granted leave. By consent there is no order as to costs.

F

BACKGROUND

[2] Briefly in 2008, 2009 and 2010 the applicant had made applications for
G funds from the special constituency allowance for SMJK Shin Chung, SJK Methodist and Nurul Ihsan Orphanage and to aid the *orang asli*. In respect of the application in 2008 (exh MJD17) the second respondent replied that the application 'tidak dapat dipertimbangkan' (exh MJD18). The second respondent did not respond to the applicant's request for an explanation as to
H why his application could not be considered. In respect of an application made in 2009 (exh MJD27) for various projects which the applicant says fall within situations for which funding will be or has been approved according to the ICU website, by letter dated 3 November 2009 the second respondent replied stating as follows:

I

> PERMOHONAN RM345,000.00 DARI PERUNTUKAN KAWASAN PARLIMEN SUNGAI SIPUT TAHUN 2009
>
> Dengan hormatnya saya merujuk kepada Y.B. mengenai perkara di atas.
>
> 2. Dimaklumkan bahawa peruntukan untuk sumbangan kepada mangsa-mangsa

bencana alam disalurkan apabila berlaku sesuatu bencana. Oleh yang demikian, YB disyorkan mengemukakan permohonan tersebut jika berlaku apa-apa bencana alam kepada Pejabat Daerah Sungai Siput atau Kuala Kangsar untuk diselaraskan supaya id tidak bertindih dengan sumbangan dari lain-lain jabatan dan agensi. Disamping itu, pejabat daerah juga telah diperuntukkan sejumlah RM30.000.00 setiap tahun untuk maksud yang sama.

3. Berkaitan dengan peruntukan untuk sekolah-sekolah iaitu Sekolah Gandhi, Dovenby, Shin Chung Secondary dan Sekolah Methodist, YB disyorkan untuk mengemukakan permohonan tersebut kepada Jabatan Pelajaran Negeri Perak untuk pertimbangan.

4. Bagi lain-lain permohonan seperti asrama anak yatim, subsidi bas sekolah, asrama orang tua, projek serta masalah di Kampung Orang Asli, kumpulan OKU serta projek membaiki dewan orang ramai, pejabat ini sekali lagi mencadangkan supaya permohonan-permohonan ini dikemukakan melalui pejabat daerah untuk diselaraskan dengan jabatan ini dan agensi yang berkaitan kerana peruntukan RM500,000.00 bagi tahun 2009 tidak dapat menampung semua keperluan dalam seluruh Kawasan Parlimen Sungai Siput.

Sekian, terima kasih.

The applicant states that the projects for which he had applied for funds were the kind of projects for which funds from the special constituency allocation are meant for. The second respondent did not respond to his request for an explanation.

[3] On 9 July 2010 the applicant wrote to the second respondent to apply for funds from the special constituency allocation for the year 2010 for various projects and activities (exh MJD30). The applicant says that these projects and activities fall within the situations for which funding will be, and has been approved according to the first respondent's website (exh MJD13), the written responses by the Prime Minister's Department in Parliament (exhs MJD20, MJD21, MJD22, MJD23 and MJD24) and the second respondent's letter dated 19 October 2009 (exh MJD26). In reply by a letter dated 26 July 2010 (exh MJD31) the second respondent states as follows:

PERMOHONAN RM650,000.00 DARI PERUNTUKAN KHAS KAWASAN PARLIMEN SUNGAI SIPUT UNTUK TAHUN 2010

Dengan hormatnya saya merujuk kepada surat Y.B. mengenai perkara di atas.

2. Sukacita dimaklumkan bahawa sehingga 25 Julai 2010, 56 projek bernilai RM1.72 juta peruntukan khas ICU JPM telah diluluskan bagi kawasan Parlimen Sungai Siput, Sembilan (9) projek bernilai sebanyak RM1.15 juta sedang dilaksanakan, 47 projek bernilai RM561.865.15 telahpun siap dilaksanakan.

3. Permohonan Y.B. supaya sejumlah RM50.000.00 untuk mangsa-mangsa bencana alam disimpan di Pejabat Tanah tidak dapat dipertimbangkan kerana tiada peruntukan yang dikhaskan untuk disimpan di Pejabat Tanah. Y.B.

dicadangkan mengemukakan senarai mangsa yang terlibat beserta laporan polis untuk dipertimbangkan supaya tidak bertindih dengan sumbangan dari agensi Kerajaan yang lain jika ada berlaku bencana alam.

4. Berkaitan cadangan Y.B. untuk perbelanjaan kepada pihak sekolah dan badan-badan disebutkan, Y.B. diminta mengemukakan senarai nama PIBG sekolah-sekolah yang berkenaan dan nama berdaftar badan-badan amal yang berkenaan serta butir-butir akaun bank untuk dipertimbangkan.

Seian, terima kasih.

The applicant states that he requested for clarification as to whether the 56 projects worth RM1.72m were approved in 2010 only or since March 2008, and for details of the projects. He also provided the details requested by the second respondent. When the applicant did not receive a response within a reasonable, he sent a letter dated 8 October 2010 to the second respondent stating that if he did not receive a response by 15 October 2010 he would assume that his application is rejected (exh MJD33).

[4] By letter dated 12 October 2010 (exh MJD34) the second respondent states as follows ('written decision'):

PERMOHONAN RM650.000.00 DARI PERUNTUKAN KHAS KAWASAN PARLIMEN SUNGAI SIPUT UNTUK TAHUN 2010

Dengan hormatnya saya merujuk kepada perkara di atas.

2. Dimaklumkan bahawa sejumlah 56 tajuk telah diluluskan dalam tahun 2010 (sehingga 25hb Julai) di Kawasan Parlimen Sungai Siput melibatkan peruntukan berjumlah RM1.72 juta. Jumlah tersebut meliputi sumbangan, bekalan dan juga projek.

3. Untuk makluman Yang Berhormat, sumbangan yang diberikan merangkumi pemberian kepada pertubuhan serta persatuan seperti PIBG SMJK Shing Chung, PIBG Methodist dan Anak-Anak Yatim Nurul Ihsan sebagaimana yang tercatat dalam surat Yang Berhormat. Disamping itu, sekolah-sekolah Masyarakat Orang Asli seperti SK Pos Piah, SK Pos Perwor dan lain-lain serta juga Batin-Batin Orang Asli juga mendapat faedah dari sumbangan tersebut.

4. Memandangkan peruntukan yang terhad, maka pihak yang telah menerima sumbangan seperti yang disebutkan tidak akan dipertimbangkan manakala yang lain-lain akan diteliti keperluannya manakala projek-projek kecil di kawasan Orang Asli dinasihatkan supaya dikemukakan permohonan kepada Jabatan Hal Ehwal Orang Asli.

Sekian, terima kasih.

[5] The applicant states that after receiving the 'written decision' dated 12 October 2010 above, he confirmed with the principal of SMK Shin Chung, the senior assistant principal of SMK Methodist and one Norhisan of the Nurul Ihsan Orphanage who informed him that they have not received any funds

from the ICU or the second respondent in the course of year 2010. Therefore the applicant says that the reasons given by the second respondent in the letter dated 12 October 2010 is false and incorrect. The applicant states that the 'written decision' shows that funds from the special constituency allocation seemed to have been given to SMK Shin Chung, SMK Methodist and Nurul Ihsan Orphanage through some other parties' application while his application was rejected.

[6] The applicant contends that the respondents or any of them has erred in law in the exercise of their discretion with regard to the administration and disbursement of the special constituency allocation and has acted capriciously, with bias and/or for improper purpose, failed to take into account relevant factors and has taken into account irrelevant factors, inter alia, that the application was made by an opposition member of Parliament, in breach of procedural fairness by failing to provide adequate or any reason for the 'written decision' and had made an irrational decision and manifestly unfair which no reasonable or sensible person or body of persons applying their mind to the question and/or acting in accordance with law and procedural propriety would have made.

[7] The applicant states that he is also seeking orders from this court for disclosure and determination of the manner upon which the power and/or discretion vested in the respondents (or any of them) is exercised. It is averred that it is necessary to compel the respondents to show cause and give information as to their authority to exercise, vest and/or delegate the discretion to approve and disburse finds from the special constituency allocation and to explain their respective roles and relationship in relation to one another. It is also necessary to compel the respondents to specify the kinds of projects and activities for which application for funds from the special constituency allocation will be granted, who can apply and all the conditions and criteria taken into consideration by the respondents in granting funding applications for the special constituency allocation as well as the time limits within which decisions on such applications must be made.

[8] Hence by way of encl 1 the applicant applies for leave for judicial review for the following reliefs:

(a) A writ of 'quo warranto' be issued against the respondents and each of them to show cause and give information as to their authority to exercise, vest and/or delegate the discretion to approve and disburse funds from the federal consolidated funds which are allocated in the federal budget 2010 and any annual federal budget to the Prime Minister's Department (as 'Peruntukkan Khas' or 'Peruntukkan Khas Perdana Menteri untuk Kawasan Parlimen') for all Parliamentary constituencies ('special

constituency allocation'), and to explain their respective roles and relationship in relation to one another;

(b) an order of mandamus to compel the respondents and each of them to specify:

(i) the kinds of projects and activities for which application for funds from the special constituency allocation will be granted;

(ii) who can apply for funds from the special constituency allocation;

(iii) all conditions and criteria taken into consideration by the respondents in granting funding applications for the special constituency allocation; and

(iv) the time limits within which decisions on applications for the special constituency allocation will be made.

(c) a declaration that, in accordance with art 8(1) of the Federal Constitution, the special constituency allocation must be provided and available to all members of Parliament equally, that the power and discretion vested in the respondents or any of them to approve applications for funds from the special constituency allocation must be exercised equally and equitably amongst all members of Parliament and all categories of applicants, regardless of political affiliations, and that the same criteria or conditions must be applied in considering all such applications;

(d) a declaration that the decision of the second respondent set out in the second respondent's letter dated 12 October 2010 or any part thereof is a breach of art 8(1) of the Federal Constitution and as a result, unconstitutional and void;

(e) an order of certiorari to quash the decision of the second respondent as set out in the second respondent's letter dated 12 October 2010 or any part thereof, and consequently:

(i) an order of mandamus to compel the respondents or any of them to grant the applicant's application w'ote his letter dated 9 July 2010 to the second respondent for funds from the special constituency allocation for the Sungai Siput Parliamentary Constituency (P62) for the year 2010; or

(ii) in the alternative, an order of mandamus to compel the respondents to exercise their discretion to grant applicant's application wcfe his letter dated 9 July 2010 to the second respondent for funds from the special constituency allocation for the Sungai Siput Parliamentary Constituency (P62) for the year 2010 in accordance with the guidelines and practice specified

pursuant to prayer two above and art 8(1) of the Federal Constitution pursuant to prayer three above;

(f) an order of mandamus to compel the respondents to specify:

(i) all projects and activities for which application for funds from the special constituency allocation has been granted since 2008 for the Sungai Siput Parliamentary Constituency (P62);

(ii) the number of applications received, the persons or parties whose applications were approved and rejected and the persons or parties to whom the funds were disbursed for the applications that were approved vis a vis the special constituency allocation since 2008 for the Sungai Siput Parliamentary Constituency (P62); and

(iii) the time limits within which the applications for funds from the special constituency allocation since 2008 for the Sungai Siput Parliamentary Constituency (P62), were decided;

(g) damages and/or punitive, aggravated and/or exemplary damages to be paid to the applicant by the respondents;

(h) an inquiry and/or at the applicant's option an assessment of damages and/or punitive, aggravated and/or exemplary damages to be paid to the applicant by the respondents;

(i) costs; and

(j) all necessary and consequential relief, orders and/or directions.

GROUNDS FOR APPLICATION

[9] The grounds for the application are set out in paras 48–63 of the applicant's affidavit in support (encl 3). The applicant avers that given that the special constituency allocation utilises public monies from the federal consolidated fund, it is imperative for applicants of the said fund and the public to know:

(a) whether the Directors of the PPNs (such as the second respondent) or the Director General of the ICU (the first respondent) has the power or discretion to approve and disburse funds from the special constituency allocation;

(b) how the abovementioned discretion is to be exercised, the conditions (if any) upon which it can be exercised, the time limit within which it must be exercised and who are the parties who can apply for funds from the special constituency allocation;

(c) in respect of the second respondent's letter dated 12 October 2010 (exh MJD34), the reason given for the said non-consideration/rejection is

false or incorrect and the exercise of discretion by the second respondent was on a false premise as no such funds to the stated schools/organisations were allocated from the special constituency allocation for Sungai Siput for the year 2010;

(d) the reason given by the second respondent contradicts the second respondent's response to the applicant's previous applications in 2008 and 2009 and reveals that the respondents or any of them exercised their discretion with regard to the administration and disbursement of the special constituency allocation capriciously, with bias and/or improper purposes;

(e) in respect of the other projects applied for under the applicant's 2010 application, the decision to 'assess the necessity' of those projects instead of making a decision and approving them is an inordinate delay and therefore a failure to exercise the discretion conferred upon the respondents. The decision is therefore indecisive, unjust and arbitrary;

(f) the applicant has a legitimate expectation of receiving a decision from the respondents or any of them for each and every one of the projects applied for within seven days or at least within 30 days from receipt of the same;

(g) the applicant's 2010 application ought to have been granted as the projects for which funds were applied for are projects of the kind for which funds from the special constituency allocation are supposed to be granted and disbursed; and

(h) the second respondent by the letter dated 26 July 2010 (exh MJD31) had signified/represented that the applicant's 2010 application would be granted upon provision of details of the recipients/payment details requested by the second respondent. In the circumstances the applicant has a legitimate expectation that the funds sought would be granted.

THE OBJECTION

[10] The attorney general objects to the application for leave on the ground that there is no substance in the application and the application is an abuse of process. Briefly the objection is based on the following grounds:

(a) Quo warranto

(i) Quo warranto is one of the prerogative writs used to challenge the appointment of a person who holds public office on the grounds that he is not qualified or there was a legal flaw in his appointment. This process is to determine whether he is entitled to hold the office and to discharge its functions.

(ii) There is nothing in the face of the applicant's application that

challenges the respondents' qualification to hold public office or allege that there was some flaw in their appointments.

(iii) The applicant is using the prerogative writ to elicit information that he has already sought to obtain as a member of Parliament. This is evident from the queries in Parliament in exhs MJD4–MJD7.

(b) Mandamus

(i) O 53 r 1(1) of the RHC 1980 provides that an application seeking the relief in para 1 of the Schedule to the Courts of Judicature Act 1964 which includes an application for an order of mandamus is governed by O 53 of the RHC 1980.

(ii) O 53 r 1(2) of the RHC 1980 however provides that the same is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 which is on the performance of public duties.

(c) Declaration

(i) exh MJD6 makes it clear that the special constituency allocation ('the allocation') is available for the 'rakyat' on application of not only Members of Parliament, irrespective of whether they are members of the ruling party or the opposition; and

(ii) there is no basis to seek the court's intervention to declare something that is already clear.

(d) Certiorari and mandamus

(i) the second respondent is tasked to exercise discretionary powers in considering applications for the use of the allocation from various parties;

(ii) mandamus is usually granted to compel the performance of a statutory duty by a public authority;

(iii) there is nothing in the applicant's cause papers to suggest that the second respondent is acting pursuant to a statutory duty; and

(iv) the use of the order of mandamus to compel the second respondent to allow the applicant's application will be contrary to the objective of the allocation.

[11] Learned senior federal counsel submits that the decision is based on policy considerations which is a management prerogative and therefore it is not reviewable by this honourable court (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2

CLJ 11). It is submitted that this honourable court is in no position and not the proper forum to evaluate the qualifications or applications of the special constituency allocation and to determine the policy. It requires a comprehensive process of evaluation by the second respondent which will also involve safeguarding of public interest and should only be exercised by a person who is qualified and as such these matters are best left in the hands of persons who have the responsibility upon it to ensure uniformity in the implementation of the said policy. As the decision is based on policy considerations which is the management prerogative, it is not reviewable by this court and the application is scandalous, frivolous and vexatious and an abuse of the process of the court. Learned senior federal counsel further submits that the special constituency allocation comes from the Federal Budget 2010 and it is now year 2011. At the end of the year the funds for 2010 are normally finalised and closed. Therefore this matter can be considered as being academic.

[12] For the applicant learned counsel submits that the attorney general is in reality challenging the merits of the application as the attorney general is challenging the sufficiency of evidence, facts and law which should only done at the hearing of the substantive application. It is submitted that at the leave stage the applicant need only show prima facie an arguable case and the application is not frivolous or vexatious. Thus the applicant is only required to show that there is some substance in the grounds supporting the application. It is submitted that a perusal of the applicant's affidavit in support shows not merely some substance in the grounds supporting the application but ample evidential support for the reliefs claimed. The attorney general's objections are not sufficient grounds to deny leave. It is further submitted that the attorney general has erroneously summarised the facts and the court must examine each and every allegation of fact and evidence for its veracity. On the issue of the relief of quo warranto it is submitted that the applicant is challenging the respondents' qualifications to hold office on the basis that there are conflicting statements as to their respective power and authority in disbursing the special constituency allocation. On the issue of s 44 of the Specific Relief Act 1950 that the applicant must bring himself within one of the grounds under the said section, it is submitted that in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665 the Court of Appeal has dismissed the same objection.

DECISION

[13] In considering this application I am guided by the judgment of the Court of Appeal in the case of *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 where in his judgment Suriyadi Halim Omar JCA said as follows:

Under O 53 of the Rules of the High Court 1980, an applicant may procedurally seek out the reliefs specified at para 1 of the Schedule to the Courts of Judicature Act 1964, and for the purposes specified therein. Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 are the additional powers of the High Court, powers in addition to those already seised by it, to issue prerogative writs, wherein a High Court judge may issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. Section 25 of the Courts of Judicature Act 1964, when read together with para 1 of the Schedule, provides the High Court of that augmented power.

His Lordship said further:

... the Federal Court had approved the guidelines laid down in the case of *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 when considering the application of leave. The guidelines are as follows:

(a) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(b) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(c) If on considering the papers the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award,... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

In *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193; [2007] 5 CLJ 36 James Foong JCA (as His Lordship then was) said:

At leave stage, which is the status of the appellants' application, Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 643 said:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for that relief."

[14] Learned senior federal counsel submits that evaluation of the qualifications or applications of the special constituency allocation is based on policy considerations and the court is not the proper forum to evaluate the qualifications or applications of the special constituency allocation and to determine the policy which, being a management prerogative is not reviewable by the court. To my mind the exercise of discretion in the evaluation of the qualifications or applications of the special constituency allocation may well be based on policy considerations within the management prerogative but the applicant contends that the respondents, in the exercise of discretion with regard to the administration and disbursement of the special constituency allocation has acted capriciously, with bias and/or for improper purpose, has failed to take into account relevant factors and has taken into account irrelevant factors.

[15] I am of the view that the mere assertion that this is a matter of management prerogative and therefore not reviewable by the court is insufficient. It is a question of evidence. Even where the executive asserts that a particular decision is not susceptible to judicial review on the ground of national security, Lord Fraser of Tullybelton in *Council of Civil Service Unions v Minister for the Civil Service* said at p 402 as follows:

> The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.

In the same case Lord Roskill said at p 420 as follows:

> My Lords, the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. But they have also been obliged to recognise that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds.

Further even in circumstances where it is submitted that the exercise of a power emanates from a royal prerogative, the judgment of Lord Fraser of Tullybelton

at p 398 shows that, while acknowledging that 'within the sphere of its prerogative powers, the Crown has an absolute discretion', the case of *Attorney-General v De Keyser's Royal Hotel, Limited* [1920] AC 508 shows that 'the courts will Inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise'.

[16] I am conscious that there are limits to the court's inquiry through judicial review of certain executive actions. It is not for the courts to determine whether a particular policy or particular decision taken in fulfillment of a policy is fair. The court is only concerned with the manner the decision had been taken. In *Council of Civil Service Unions* at pp 414–415 Lord Roskill, in reference to the duty to act fairly said as follows:

> But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case... Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

[17] Having considered the submissions of both learned senior federal counsel and learned counsel for the applicant, I find that the applicant has shown that there is a case fit for further consideration. I agree with learned counsel for the applicant that there are issues that go to the merits of the application which ought to be resolved at the hearing of the substantive motion. For the reasons stated above I dismissed the objection by the attorney general and allowed the application for leave. By consent there is no order as to costs.

Leave application allowed.

Reported by Ashgar Ali Ali Mohamed